

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: GENERIC PHARMACEUTICALS  
PRICING ANTITRUST LITIGATION

MDL 2724  
16-MD-2724

Individual Case No. 18-CV-284

HON. CYNTHIA M. RUFE

THIS DOCUMENT RELATES TO:

*The Kroger Co. et al. v. Actavis Holdco U.S.,  
Inc. et al.*

**KROGER PLAINTIFFS' MEMORANDUM IN SUPPORT OF  
THEIR MOTION FOR LEAVE TO AMEND**

The Special Master’s Recommended Case Management Order of August 16, 2019 (“CMO”) contemplates bellwether trials for one or more claims or cases filed as of September 1, 2019. We are authorized to inform the Court that the State AGs have agreed for the Kroger DAPs to participate with the State AGs in a bellwether trial of the “Heritage-Related” claims as framed in the State AG’s initial Complaint in *State of Connecticut et al. v. Aurobindo Pharma USA, Inc.*, Case No. 17-cv-03768-CMR (E.D. Pa.) (The “Heritage-Related Claims”). The Kroger DAPs’ Complaint includes an overarching conspiracy claim that is broader than the Heritage-Related Claims alleged in the State AGs’ initial Complaint. Accordingly, in order to align with the State AGs for the purpose of a bellwether trial, should the Court approve, the Kroger DAPs seek leave of Court to file a Second Amended Complaint (“SAC”) that merely and only adds in the alternative claims that align with the State AGs’ Heritage-Related Claims.

The proposed SAC does not substantively alter the Kroger DAPs’ existing allegations and will not prejudice any Defendant. Nor does the proposed amendment add any new Defendants or any new drugs. Instead, this proposed amendment is a belt-and-suspenders measure that conforms certain of the Counts in the Kroger DAPs’ Complaint to the overarching conspiracy Counts that the States already assert in their Heritage-Related Conspiracy.<sup>1</sup> Specifically, the Kroger DAPs seek to add the following Defendants – all of which are already named as Defendants in the Kroger DAPs’ original overarching conspiracy – to the following individual drug conspiracies as detailed below on this chart:

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<sup>1</sup> The amendment also clarifies that Albertsons Companies LLC asserts certain claims as the assignee of its subsidiary, Safeway Inc., and as the assignee of Cardinal Health.

Count	Generic Drug	Original Defendants	Added Defendants
2	Acetazolamide	Heritage, Lannett, Taro, Teva, Zydus	Actavis, Apotex, Aurobindo, Citron, Dr. Reddy's, Glenmark, Mayne, Mylan, Par, Sandoz, Sun
3	Albuterol	Mylan, Sun	none
4	Amitriptyline	Mylan, Par, Sandoz	none
5	Baclofen	Lannett, Par, Teva, Upsher-Smith	none
6	Benazepril HCTZ	Mylan, Sandoz	none
7	Clobetasol	Actavis, Akorn, Fougera, Hi-Tech, Morton Grove, Perrigo, Sandoz, Taro, Wockhardt	none
8	Clomipramine	Mylan, Sandoz, Taro	none
9	Desonide	Actavis, Fougera, Perrigo, Sandoz, Taro	none
10	Digoxin	Impax, Lannett, Mylan, Par, West-Ward	none
11	Divalproex ER	Dr. Reddy's, Mylan, Par, Zydus	none
12	Doxycycline	Actavis, Heritage, Lannett, Mayne, Mylan, Par, Sun, West-Ward	Apotex, Aurobindo, Citron, Dr. Reddy's, Glenmark, Sandoz, Teva, Zydus
13	Econazole	Fougera, Perrigo, Taro, Teligent	none
14	Fluocinonide	Actavis, Taro, Teva	none
15	Fosinopril HCTZ	Aurobindo, Citron, Glenmark, Heritage, Sandoz	Actavis, Apotex, Dr. Reddy's, Lannett, Mayne, Mylan, Par, Sun, Teva, Zydus
16	Glipizide	Heritage, Mylan, Teva	Actavis, Apotex, Aurobindo, Citron, Dr. Reddy's, Glenmark, Lannett, Mayne, Par, Sandoz, Sun, Zydus
17	Glyburide	Aurobindo, Citron, Heritage, Teva	Actavis, Apotex, Dr. Reddy's, Glenmark, Lannett, Mayne, Mylan, Par, Sandoz, Sun, Zydus
18	Glyburide-Metformin	Actavis, Aurobindo, Citron, Heritage, Teva	Apotex, Dr. Reddy's, Glenmark, Lannett, Mayne, Mylan, Par, Sandoz, Sun, Zydus
19	Leflunomide	Apotex, Heritage, Teva	Actavis, Aurobindo, Citron, Dr. Reddy's, Glenmark, Lannett, Mayne, Mylan, Par, Sandoz, Sun, Teva, Zydus Actavis, Aurobindo, Citron, Dr. Reddy's, Glenmark, Lannett, Mayne, Mylan, Par, Sandoz, Sun, Teva, Zydus

20	Levothyroxine	Lannett, Mylan, Sandoz	none
21	Lidocaine-Prilocaine	Akorn, Fougera, Hi-Tech, Impax, Sandoz	none
22	Meprobamate	Dr. Reddy's, Heritage	Actavis, Apotex, Aurobindo, Citron, Glenmark, Lannett, Mayne, Mylan, Par, Sandoz, Sun, Teva, Zydus
23	Metronidazole	G&W, Impax, Sandoz, Teva, and Valeant	none
24	Nimodipine	Heritage, Sun	Actavis, Apotex, Aurobindo, Citron, Dr. Reddy's, Glenmark, Lannett, Mayne, Mylan, Par, Sandoz, Teva, Zydus
25	Nystatin	Actavis, Heritage, Par, Perrigo, Sandoz, Sun, Taro, Teva, Mylan	Apotex, Aurobindo, Citron, Dr. Reddy's, Glenmark, Lannett, Mayne, Zydus
26	Paromomycin	Heritage, Sun	Actavis, Mylan, Apotex, Aurobindo, Citron, Dr. Reddy's, Glenmark, Lannett, Mayne, Par, Sandoz, Teva, Zydus
27	Pravastatin	Actavis, Apotex, Glenmark, Lupin, Mylan, Sandoz, Teva, Zydus	none <sup>2</sup>
28	Propranolol	Actavis, Breckenridge, Heritage, Mylan, Par, Teva, Upsher-Smith	none
29	Theophylline ER	Heritage, Teva	Actavis, Mylan, Apotex, Aurobindo, Citron, Dr. Reddy's, Glenmark, Lannett, Mayne, Par, Sandoz, Sun, Zydus
30	Ursodiol	Actavis, Epic, Lannett	none
31	Verapamil	Actavis, Heritage, Mylan	Apotex, Aurobindo, Citron, Dr. Reddy's, Glenmark, Lannett, Mayne, Par, Sandoz, Sun, Teva, Zydus
32	Zoledronic Acid	Dr. Reddy's, Heritage	Actavis, Apotex, Aurobindo, Citron, Glenmark, Lannett, Mayne, Mylan, Par, Sandoz, Sun, Teva, Zydus

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<sup>2</sup> The Kroger DAPs previously dismissed this Count against Dr. Reddy's without prejudice. ECF No. 98. The SAC reflects this voluntary dismissal and removes allegations against Dr. Reddy's related to Pravastatin only.

This amendment will not prejudice any Defendant. All of the Defendants that the Kroger DAPs seek to add to the individual drug conspiracies are already named as Defendants in the all-Defendants/all-Generics conspiracy alleged in Count One of the Kroger DAPs' original Complaint. As the Court recently ruled, that broader overarching conspiracy satisfies the plausibility requirements of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). See Order Denying Joint Motion to Dismiss Overarching Conspiracy Claims, ECF No. 1071. Because these individual-drug conspiracies are already included within Count One of the Kroger DAPs' First Amended Complaint, this amendment does not alter the potential scope of any Defendant's liability.

In other words, the proposed SAC does not broaden this MDL in any way. It does not add any new party. It does not add any new claim or any new drug. And, because the States have already pled the overarching conspiracies to which the Kroger DAPs seek to conform certain claims, the proposed SAC will not increase the burden of any Defendant to litigate the claims against it.

By way of example, the amended pleading adds Apotex as a named Defendant in Count Two, the individual-drug conspiracy for Acetazolamide. But the Kroger DAPs already alleged that Apotex conspired to fix the prices of Acetazolamide (and all other generic drugs identified in the Complaint) with all of the other Defendants named in the First Amended Complaint. Moreover, the State AGs have already alleged that Apotex conspired to fix the prices of Acetazolamide with all the Defendants identified in their Complaint. Thus, the Kroger DAPs' proposed amendment does not assert any new claim against Apotex.

Finally, the Kroger DAPs recognize that several of the individual Defendants' motions to dismiss the overarching conspiracy claims remain pending. But because the proposed amendment does not alter the scope of any Defendants' liability or add any substantive allegations, the result

of those motions will be the same whether applied to this proposed SAC, or whether applied to the Kroger DAPs' First Amended Complaint.

Again, by way of example, Apotex has moved individually to dismiss all Plaintiffs' overarching conspiracy claims, including the Kroger DAPs' all-Defendants/all-Generics overarching conspiracy and the State AGs' overarching conspiracy claims. Thus, any Order by the Court resolving that individual motion will apply to the Kroger DAPs' proposed SAC the same as it would to the current First Amended Complaint. If the Court denies Apotex's motion as to the Kroger DAPs' broader overarching conspiracy claim, then it necessarily follows that the more narrow individual-drug claim – which is wholly subsumed by the broader overarching conspiracy claim – survives as well. And if the Court grants Apotex's motion as applied to the State AGs' Complaint, then the same result would necessarily apply to the Kroger DAPs' SAC, which conforms certain claims to the ones asserted by the State AGs. For this reason, the Kroger DAPs' ask that the Court substitute the proposed SAC for the Kroger DAPs' current First Amended Complaint for the purposes of the pending motions to dismiss.

### **CONCLUSION**

Rule 15(a)(2) contemplates that leave to amend should be granted freely when justice so requires. The proposed Second Amended Complaint does not prejudice any Defendant in this MDL and does not alter the scope of this MDL in any way. Instead, the proposed Second Amended Complaint conforms certain claims already asserted by the Kroger DAPs to claims already asserted by the State AGs, so that the States and the Kroger DAPs could jointly try these claims in a potential bellwether trial, subject to the Court's approval. Leave to amend under Rule 15(a)(2) is therefore appropriate. *See* Memorandum Opinion & Order Granting Leave to Amend. ECF No. 603 & 604.

Dated: August 30, 2019

Respectfully submitted,

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